THE COMMON LAW'S HODGEPODGE PROTECTION OF PRIVACY

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1. Introduction

In the last decade, courts in several Commonwealth countries have recognized discrete actions for the invasion of privacy. These causes of action share many common features, but also contain important differences.[1] In England, the action is aimed at protecting against unwanted disclosures of private information, and is conceptualized not as a tort, but as a modified form of the ancient equitable action for breach of confidence.[2] In New Zealand, there are now two discrete torts of invasion of privacy—one applicable to unwanted disclosures, and the other capturing bare intrusions into private spaces.[3] Australia appears to be following a similar path, although the jurisprudence there is less developed.[4] And in 2012, the Ontario Court of Appeal created a new tort of intrusion upon seclusion in *Jones v Tsige*,[5] modelled largely on American common law.[6] At present, this tort only applies to intrusions into private affairs, but there are indications that it will evolve to capture unwanted disclosures of private information in the future.[7]

To date, Ontario is the only Canadian province with a firmly established common law privacy tort, although Nova Scotia may not be far behind.[8] Four other

[1] Some of these similarities and differences are canvassed in Chris DL Hunt, "Privacy in the Common Law: A Critical Appraisal of the Ontario Court of Appeals' Decision in *Jones v. Tsige*" (2012) 37:2 Queen's LJ 665.

[2] *Campbell v MGN*, [2004] UKHL 22, [2004] 2 AC 457 [*Campbell*].

[3] *Hosking v Runting*, [2004] NZCA 34 (disclosures); *C v Holland*, [2012] NZHC 2155 (intrusions).

[4] See e.g. *Australian Broadcasting Corp v Lenah Game Meats Pty Ltd*, [2001] HCA 63; *Doe v Australian Broadcasting Corp*, [2007] VCC 281; *Grosse v Purvis*, [2003] QDC 151.

[5] *Jones v Tsige*, 2012 ONCA 32, 108 OR (3d) 241 [*Jones*].

[6] The common law approach is reflected in the *Restatement of the Law Second, Torts*, vol 3 (American Law Institute, 1977) at s 652A-D.

[7] Justice Sharpe, on behalf of the unanimous Court of Appeal, drew upon the doctrine of *Charter* values to justify creating a privacy tort. He also adopted the Supreme Court of Canada's taxonomy of privacy as reflected in its section 8 *Charter* jurisprudence (elaborated on in the section immediately below). Importantly, one dimension of privacy is "informational privacy" and this, his Lordship noted, has long been understood by the Supreme Court to encompass, broadly speaking, a "claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others" (see *supra* note 5 at para 41). This passage suggests that the court would extend the action to cover unwanted disclosures of private information in the future. Moreover, American common law, which was influential in *Jones* in shaping the intrusion upon seclusion tort, has long had a disclosure-based action as well (*ibid* at s 652D).

[8] See *Trout Point Lodge Ltd v Handshoe*, 2012 NSSC 245 at paras 53-80, 1014 APR 22.

common law provinces (British Columbia,[9] Manitoba,[10] Saskatchewan[11] and Newfoundland and Labrador[12]) have statutory torts of invasion of privacy, modelled loosely on the American common law.[13] Quebec, too, has long had a civil action for invasion of privacy, stemming from its *Charter of Rights and Freedoms*.[14]

But what of the privacy protection available to Canadians living in those jurisdictions that lack discrete privacy torts? This paper seeks to answer that question. I begin, in section two, by briefly identifying the key privacy interests (territorial, personal, and informational) that will form the basis of the remaining discussion. In section three, I then canvass a panoply of torts that have long been pressed into service to vindicate what courts here and in England have acknowledged to be invasions of these three privacy interests. From this examination we see that, despite the sometimes considerable effort of courts to protect privacy, this hodgepodge approach suffers from three significant limitations, which are explained in section four. First, there remain gaps in the protection of privacy. Second, invoking a hodgepodge of torts to protect privacy indirectly, rather than directly via a discrete privacy tort, causes conceptual and jurisdictional fragmentation. Finally, this approach is inherently confused and arguably unprincipled. A better way forward, I conclude, is for legislators or courts to act and create discrete privacy torts in those provinces that have not yet done so.

2. Conceptualizing Privacy

Forty years ago, the prominent philosopher Judith Jarvis Thomson observed that the "most striking thing about the right to privacy is that nobody seems to have any clear idea what it is".[15] Since then, there has been a vast outpouring of literature attempting to define the concept.[16] Despite the many persistent and serious attempts at elucidation, privacy remains a deeply—arguably an *essentially*—contested concept.[17] Although there is no consensus in the literature about what *exactly* privacy means, or *which specific instances of invasion* should be actionable, there is, nevertheless, broad agreement among most privacy scholars that the right to privacy must, at a higher level of abstraction, encompass two broad dimensions. The first concerns what may be

[9] *Privacy Act*, RSBC 1996, c 373.

[10] *The Privacy Act*, CCSM c P125.

[11] *The Privacy Act*, RSS 1978, c P-24.

[12] *Privacy Act*, RSNL 1990, c P-22.

[13] *Supra* note 6.

[14] For elucidation, see *Aubry v Éditions Vice-Versa Inc*, [1998] 1 SCR 591, 339 DLR (4th) 279.

[15] Judith Jarvis Thomson, "The Right to Privacy" (1975) 4:4 Philosophy & Public Affairs 295 at 295.

[16] For a recent examination of many leading theoretical approaches, see: Chris DL Hunt, "Conceptualizing Privacy and Elucidating its Importance: Foundational Considerations for the Development of Canada's Fledgling Privacy Tort" (2011) 37:1 Queen's LJ 167.

[17] One leading scholar lamented that he "sometimes despair[s] whether [privacy] can be usefully addressed at all": Robert C Post, "Three Conceptions of Privacy" (2001) 89:6 Geo LJ 2087 at 2087; another remarked that privacy jurisprudence and theory is in "conceptual shambles": WA Parent, "A New Definition of Privacy for the Law" (1983) 2:3 Law & Phil 305 at 305.

called freedom from the unwanted *intrusion* into private affairs and spaces, and this would capture matters such as unwanted physical touching, examining one's banking records, or peering into private places. The second category concerns freedom from the unwanted *disclosure* of private information, such as the unauthorized posting of one's diary on the internet.[18] The essential disagreement among scholars is not that privacy must in principle encompass these two dimensions; rather, it is *which types* of intrusions and disclosures qualify as sufficiently private to merit protection. The resolution of that question (if such a resolution is even possible[19]) quite obviously falls outside the scope of this paper.

For present organizational[20] purposes, it is sufficient to adopt the Supreme Court of Canada's taxonomy of privacy, as Justice Sharpe recently did for the unanimous Ontario Court of Appeal in *Jones* when deciding to create a new common law tort of intrusion upon seclusion.[21] His Lordship noted that the Court has long recognized in its *Charter* jurisprudence three interrelated clusters of privacy interests.[22] These serve to refine our thinking about privacy, if we bear in mind that each of these interests can, in principle, be invaded by both disclosures and intrusions.[23] The first interest is territorial privacy. It "protects the home and other spaces where the individual enjoys a reasonable expectation of privacy".[24] The second is personal privacy. Grounded in the individual's bodily integrity, it protects the "right not to have our bodies touched or exposed to disclose objects or matters we wish to conceal".[25] Finally, there is informational privacy. In relation to this admittedly

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[18] Nicole Moreham, a leading privacy scholar in New Zealand, has recently observed that these two dimensions of privacy are widely accepted by most privacy scholars—see, for a list of many sources here, Nicole Moreham, "Beyond Information: Physical Privacy in English Law" (2014) 73:2 Cambridge LJ 350 at 3, n 10; *cf* Hunt, *supra* note 16 (discussing many theorists that recognize these two essential dimensions of privacy).

[19] One leading scholar, Daniel Solove, doubts whether it is possible or desirable to ascertain an abstract theoretical definition of privacy, and instead argues it is more productive to map privacy rights and invasions as they already exist: see Daniel Solove, "A Taxonomy of Privacy" (2006) 154:3 U Pa L Rev 477.

[20] It is important to bear in mind in the Supreme Court of Canada's caution that these three privacy interests are simply "analytical tools, not strict or mutually exclusive categories" and that they may, and often do, overlap: *R v Spencer*, 2014 SCC 43 at para 35, 375 DLR (4th) 255 [*Spencer*].

[21] *Supra* note 5 at para 41.

[22] *Ibid*, citing *R v Dyment*, [1988] 2 SCR 417, 73 Nfld & PEIR 13, and *R v Tessling*, 2004 SCC 67, [2004] 2 SCR 432.

[23] For example, in *Jones* itself the court determined that simply accessing the plaintiff's banking records without permission constituted an intrusion into informational privacy. Had the defendant posted these records online, a clear case of disclosure would exist as well. Likewise, unauthorized entry into one's bedroom would constitute a violation of territorial privacy; and, if photos were taken of the inside of one's underwear drawer and published in a magazine, this territorial privacy claim would be offended by disclosure as well.

[24] *Supra* note 5 at para 41.

[25] *Ibid*.

"evanescent" concept,[26] which is grounded in the notion that "information about an individual is in a fundamental way his own", the Supreme Court has adopted the articulation put forth by the eminent privacy theorist Alan Westin, who described it as the "claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others".[27]

3. The Common Law's Hodgepodge Protection of Privacy

In this section, I adopt the above taxonomy of privacy interests, and examine, under the three broad headings of proprietary, personal, and informal privacy, various causes of action that courts in Canada and England have invoked to protect what are acknowledged to be invasions of privacy.

(A) Intrusions into Property

i. Trespass to Land

Commentators have long noted that trespass can, in principle, provide a measure of privacy protection.[28] This was acknowledged by Ellenborough CJ more than two centuries ago in *Burdett v Abbott*, wherein his Lordship, in the course of adjudicating a trespass action involving unauthorized entry into a home, noted that such behaviour offended the "private repose…every man [has] in his own house."[29] Similarly, in *Merest v Harvey*, another trespass case, Gibbs CJ said that exemplary damages could be awarded for the offense caused when a man intrudes on another's property and peers into his windows.[30] An Australian case has since followed suit, awarding exemplary damages in trespass to compensate the plaintiff's hurt feelings where his privacy was invaded by the defendant who installed a secret microphone in his home.[31] A couple of recent Ontario cases have also pressed trespass into service to vindicate invasions of privacy. In *Lipiec v Borsa*,[32] the defendants counterclaimed that their privacy was invaded when the plaintiffs repeatedly photographed them and installed a security camera on the plaintiff's property to observe the defendants in their own yard. The court awarded $3000 in compensation for trespass and nuisance "occasioned by

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[26] *Spencer*, *supra* note 20 at para 35.

[27] *Supra* note 5 at para 41, citing *R v Tessling*, 2004 SCC 67 at para 23, [2004] 2 SCR 432, and Alan F Westin, *Privacy and Freedom* (London: The Bodley Head, 1967) at 7

[28] See David J Seipp, "English Judicial Recognition of a Right to Privacy" (1983) 3:3 Oxford J Leg Stud 325 at 334; UK, "Report of the Committee on Privacy", Cmnd 5012 (1972) at 289; Brian Neill, "Privacy: A Challenge for the Next Century" in Basil S Markesinis, ed, *Protecting Privacy* (New York: Oxford University Press, 1999) at 4.

[29] *Burdett v Abbott* (1811), 104 ER 501 at 560.

[30] *Merest v Harvey* (1814), 128 ER 761.

[31] *Greig v Greig*, [1966] VR 376 (SC).

[32] *Lipiec v Borsa*, [1996] OJ No 3819, 17 OTC 64 [*Lipiec*].

the deliberate invasion of…[the defendant's] privacy".[33] Similarly, in *Zorz v Attard*,[34] damages were awarded to compensate the plaintiff whose privacy was invaded when the defendant constructed windows that looked directly into his home.[35]

Although trespass has a certain robustness—being actionable *per se*, requiring neither intentional conduct[36] nor proof of damages[37]—it suffers from significant limitations as a privacy remedy. To succeed, the claimant must be an "occupier", meaning he has "possession" of the premises, which requires legal or *de facto* control of the property intruded upon.[38] Hotel guests, lodgers in another's house, and employees typically do not have sufficient possession to sue for trespass.[39] A second limitation is that, as a matter of principle, trespass requires some physical entry onto property.[40] It has thus been held in England that peering from the street into another's house with binoculars,[41] arranging mirrors on one's property in order to see the private activities inside a neighbour's home,[42] and tapping someone's telephone[43] are thus not actionable trespasses. To the extent that the Ontario cases referred to immediately above (*Lipiec* and *Zorz*) suggest otherwise, they are, with respect, wrongly decided. That said, the results in those cases can probably be explained by the fact that the claimants in each case bundled their arguments about privacy up with claims for both trespass and nuisance (the latter of which does not require physical

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[33] *Ibid* at para 18.

[34] *Zorz v Attard*, 2008 CanLII 2760 (ONSC) [*Zorz*].

[35] *Ibid* at para 24.

[36] Trespass can be committed negligently, although it will not capture involuntary action such as falling onto property in an epileptic fit: see AM Jones & MA Dugdale, eds, *Clerk and Lindsell on Torts*, 19th ed, (London: Sweet & Maxwell, 2005) at 1111-12 [*Clerk and Lindsell*]; MVH Rogers, ed, *Winfield and Jolowicz on Tort*, 17th ed, (London: Sweet & Maxwell, 2006) at 620 [*Winfield and Jolowicz*].

[37] *Entick v Carrington*, [1765] EWHC KB J98, 95 ER 807.

[38] See *Clerk and Lindsell*, *supra* note 36 at 1115-17.

[39] See *Winfield and Jolowicz*, *supra* note 36 at 621, and cases cited therein.

[40] Two exceptions are that invading an occupier's airspace by flying at an unreasonably low or unsafe height is a trespass (*Bernstein v Skyviews*, [1978] EWHC 479 (QB) [*Bernstein*]), and the unreasonable use of a public highway may constitute a trespass to one's land adjacent to the highway (*Hickman v Maisey*, [1900] 1 QB 752—in that case, trespass was committed by a man walking back and forth along the highway for hours to record racehorse trials on adjacent property).

[41] "Report of the Committee on Privacy", *supra* note 28 at 289.

[42] See Seipp, *supra* note 28 at 337; *Turner v Spooner* (1861), 30 LJ Ch 801 at 803 ("[N]o doubt the owner of a house would prefer that a neighbour should not have the right of looking into his windows or yard; but…this Court…will not interfere on the mere ground of invasion of privacy").

[43] Iain Christie, Nicole Moreham & Mark Warby, eds, *Tugendhat and Christie: The Law of Privacy and the Media*, 2nd ed (Oxford: Oxford University Press, 2011) at 440, citing *Malone v Metropolitan Police Commissioner*, [1979] 1 Ch 344 at 369 (the "eye cannot by the laws of England be guilty of a trespass…nor can the ear").

entry onto property), and the courts in each case failed to distinguish between these heads when awarding damages.[44]

Finally, it is also worth noting that the two limits on this cause of action just discussed also mean that trespass is not available where the victim is in a public place,[45] despite growing judicial[46] and academic[47] recognition that a reasonable expectation of privacy can exist in public.

ii. Private Nuisance

Private nuisance occurs when the defendant's conduct unduly interferes with the claimant's use or enjoyment of his land.[48] In *J Lyons & Sons Ltd v Wilkins*,[49] an early decision of the English Court of Appeal, it was said that an actionable nuisance could be pleaded if a person "watches and besets" another's house in order to compel him to act in a certain way. Later, in *Bernstein v Skyviews*, an English case concerning the photographing of the plaintiff's property from an airplane, Griffiths J said it would be a "monstrous invasion of…privacy" actionable in nuisance if the defendant subjected the claimant to "constant surveillance of his house from the air, accompanied by the photographing of his every activity".[50] Several Canadian cases have also accepted that nuisance actions can be used to vindicate invasions of privacy in the absence of a discrete common law or statutory privacy tort. A notorious example is *Motherwell v Motherwell*,[51] in which the Alberta Court of Appeal held that the plaintiffs, who were subjected to repeated harassing telephone calls at their home, had "established a claim in nuisance by invasion of privacy through the abuse of the system of telephone communications".[52] An Ontario court has since come to the same conclusion, in a case of harassing calls made to a man's business.[53] As mentioned above, Canadian courts have also found actionable nuisances where one neighbour installs cameras to record

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[44] See *supra* note 32 at para 19; *supra* note 34 at para 24.

[45] Jonathan Morgan, "Privacy, Confidence and Horizontal Effect: 'Hello' Trouble" (2003) 62:2 Cambridge LJ 444 at 460.

[46] See *supra* note 2; *Von Hannover v Germany*, No 59320/00, [2004] ECHR 294, 40 EHRR 1; *supra* note 14, from England, the European Court of Human Rights, and Canada, respectively.

[47] See: Andrew Jay McClurg, "Bringing Privacy Out of the Closet: A Tort Theory of Liability for Intrusions in Public Places" (1995) 73 NCL Rev 989; Elizabeth Paton-Simpson, "Privacy and the Reasonable Paranoid: The Protection of Privacy in Public Places" (2000) 50:3 UTLJ 305; Nicole Moreham, "Privacy in Public Places" (2006) 65:3 Cambridge LJ 606.

[48] See *Clerk and Lindsell*, *supra* note 36 at 1162; *Hunter v Canary Wharf Ltd*, [1997] UKHL 14 [*Hunter*].

[49] *J Lyons & Sons Ltd v Wilkins*, [1899] 1 Ch 255 [*J Lyons & Sons*].

[50] *Bernstein*, *supra* note 40 at para 7.

[51] *Motherwell v Motherwell*, [1976] AJ No 555, 73 DLR (3d) 62.

[52] *Ibid* at para 52.

[53] *Provincial Partitions Inc v Ashcor Inplant Structures Ltd*, 41 ACWS (3d) 823 at para 72, 50 CPR (3d) 497.

the activities of another.[54] In *Saelman v Hill*, in which a surveillance camera was aimed at a neighbour's driveway, the court observed more broadly that such "conduct may be labelled as…invasion of privacy" and is in "essence [a] manifestation of the well-established tort of nuisance".[55] The same reasoning was recently followed in a British Columbia Court, notwithstanding the fact that that province has a discrete statutory privacy tort that would ostensibly capture the surveillance at issue.[56]

Although nuisance is wider than trespass in that it does not require physical entry onto property,[57] the action nevertheless suffers from similar limitations as a privacy remedy. First, as in trespass, the claimant must be an owner or occupier of the land with a right to possession.[58] Second, compensation for personal distress is probably not recoverable in nuisance.[59] Thus, as Morgan notes, if Griffiths J's example in *Bernstein* actually arose, the claimant would have to point to some decrease in the amenity value of the land and would receive compensation only in relation to that lost value.[60] This is, of course, "quite different from compensating the invasion of privacy in itself".[61] Finally, on plain reading, the "watching and besetting" principle from *J Lyons & Sons* requires proof the defendant has a specific intent to influence the claimant's behaviour,[62] which would not typically be the case where the defendant's motive is simply voyeuristic or, by definition, where he acted surreptitiously.

(B) Interference with Privacy of the Person

i. Public Nuisance

[54] See *supra* note 32 at para 19; *supra* note 34 at para 24.

[55] *Saelman v Hill*, [2004] OJ No 2122 at para 36, 131 ACWS (3d) 367 (Ont SC).

[56] See *Suzuki v Munroe*, 2009 BCSC 1403 at paras 1, 99, 181 ACWS (3d) 828 [*Suzuki*]; *cf Privacy Act*, RSBC 1996, c 373 s 1.

[57] See *Clerk and Lindsell*, *supra* note 36 at 1162.

[58] *Ibid* at 1179, 1187, citing *Hunter*, *supra* note 48 which overruled the Court of Appeal's holding that a mere licensee and child in her parents' home, without a legal right of possession, had standing to sue in nuisance.

[59] *Clerk and Lindsell*, *supra* note 36 at 1179 (noting no English case has ever made such an award); *cf Hunter*, *supra* note 48 (Rejecting the suggestion that personal injury or loss of personal enjoyment are compensable in nuisance. This is because nuisance is concerned with protecting property values, not the emotional well-being of occupants).

[60] Indeed, this is precisely—and correctly—how the court in *Suzuki*, *supra* note 56 at paras 99-102, calculated the damages flowing from unreasonable surveillance by one neighbour of another.

[61] *Supra* note 45 at 459.

[62] "Report of the Committee on Privacy", *supra* note 28 at 292.

A public nuisance arises whenever the defendant's conduct "materially affects the comfort and convenience of life of a class of the public".[63] When compared to the torts just discussed, public nuisance has some increased potential for protecting privacy, as it applies to public places and it does not require the claimant to show that an interest in property has been affected. Public nuisance was pleaded successfully in *Ontario (Attorney-General) v Dieleman*,[64] a case involving aggressive anti-abortion protesters, who were enjoined from protesting within 500 feet of various abortion clinics and in front of the houses of certain doctors. The Court emphasized, in relation to both of these sets of interlocutory injunctions that were issued, that the protection of privacy was an "integral component" of the patients' reasonable use of the clinics, and of the doctors' use and enjoyment of their residential homes.[65]

Despite this promise, the action suffers from one significant limitation: the claimant must prove that a sufficient class of Her Majesty's subjects is affected by the impugned behaviour.[66] Consequently, invasions of privacy targeted at specific individuals will generally not constitute a public nuisance,[67] although, in Canada (unlike in England[68]), there is some authority for the proposition that courts can add up individual private nuisances to find a public nuisance.[69]

ii. Trespass to the Person

Trespass to the person can take three forms, each of which is actionable *per se*: assault, battery, and false imprisonment. The second of these applies straightforwardly where one's privacy is invaded by physical touching. In one Ontario case, *MacKay v Buelow*,[70] the court awarded both general and punitive damages to the plaintiff who suffered an "invasion of privacy" through the constant harassment, some of which was physical, by her ex-husband.[71]

In practice, however, this tort will often be of limited utility for vindicating many types of invasion of privacy. As some physical contact is required to prove battery, photography will not generally be actionable.[72] Assault is also limited, as the

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[63] *Winfield and Jolowicz, supra* note 36 at 643.

[64] *Ontario (Attorney-General) v Dieleman* (1994), 117 DLR (4th) 449, 49 ACWS (3d) 1059 (Ont SC).

[65] *Ibid* at paras 668, 693.

[66] *A v PYA Quarries*, [1958] EWCA Civ 1, [1957] 2 QB 169 (the size of the class is fact-dependant and case specific, at 184).

[67] "Report of the Committee on Privacy", *supra* note 28 at 291.

[68] *Winfield and Jolowicz, supra* note 36 at 643, citing *R v Rimmington*, [2005] UKHL 63 (rejecting the notion that individual private nuisances can add up to a public nuisance).

[69] See *supra* note 64 at para 415.

[70] *MacKay v Buelow*, [1995] OJ No 867, 24 CCLT (2d) 184.

[71] *Ibid* at para 16.

[72] *Kaye v Robertson*, [1990] EWCA Civ 21, [1991] FSR 62 [*Kaye*] (photography using flash bulb is not battery, although Glidewell LJ, at 68, was "prepared to accept that it may well be the case that if a bright

claimant must apprehend an immediate unlawful touching,[73] which will often not be the case where the intrusion is purely voyeuristic or conducted surreptitiously.

iii. Intentional Infliction of Emotional Distress

In *Wilkinson v Downton*,[74] the claimant obtained damages for emotional upset where the defendant, playing a practical joke, falsely informed her that her husband had been seriously injured. Commentators have long noted that this action could, in principle, be used to capture various types of serious privacy invasions.[75] Indeed, this was one of the central arguments advanced in *Wainwright v Home Office*,[76] a recent decision of the House of Lords. In that case, the claimants were strip-searched while visiting a relative at an English prison. The trial judge held that this amounted to a serious invasion of privacy and determined that *Wilkinson* could provide relief where privacy was intentionally invaded and emotional upset resulted.[77] The House of Lords subsequently reversed this decision, however. Lord Hoffmann, for the Court, held that the *Wilkinson* tort does not apply to mere distress; rather, to be actionable, the upset suffered must constitute actual harm in the sense that it amounts to a recognized psychiatric injury.[78]

As long as this actual harm requirement remains a requisite element,[79] the tort will be of very limited utility to all but the most sensitive of victims.[80] Simply put, very few invasions of privacy will cause distress amounting to a psychiatric illness.

iv. A Tort of Harassment?

Courts in Ontario and British Columbia have on several occasions considered whether an independent common law tort of harassment exists. While the status of such a tort

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light is deliberately shone into another person's eyes and…damages him in some…way, this may be in law a battery").

[73] *Collins v Wilcock*, [1984] 1 WLR 1172 at 1178.

[74] *Wilkinson v Downton*, [1897] 2 QB 57 [*Wilkinson*].

[75] Peter Burns, "The Law and Privacy: The Canadian Experience" (1976) 54:1 Can Bar Rev 1 at 20.

[76] The unreported trial judgment is summarised by Lord Hoffmann in *Wainwright v Home Office*, [2003] UKHL 53 at paras 2-12, [2003] 3 WLR 1137.

[77] See *ibid* at para 11.

[78] *Supra* note 76 at paras 41, 47; *cf Wong v Parkside Health NHS Trust*, [2001] EWCA Civ 1721 at paras 11-12, [2003] 3 All ER 932.

[79] No Canadian case has affirmatively eschewed this requirement, although some commentators have argued that distressful violations of a person's dignity ought to be actionable, even if no physical or psychiatric harm is suffered: HJ Glasbeek, "Outraged Dignity—Do We Need a New Tort?" (1968) 6 Alta L Rev 77 at 91-94.

[80] Angus Johnston, "Putting the Cart Before the Horse? Privacy and the Wainwrights" (2004) 63:1 Cambridge LJ 15 at 18 (the House's decision consigns this tort to the "category of historical interest").

is dubious,[81] at best, if one were to be clearly recognized it could provide some measure of relief to those whose privacy is invaded.[82] Of course, the extent of this protection would depend on the precise elements of the tort, and it is not possible at this point to do more than speculate what these would be, given the uncertain status of the tort itself. That said, one place to look is *Mainland Sawmills Ltd v IWA-Canada, Local 1-3567 Society*,[83] a decision of the British Columbia Supreme Court. There, the court assumed, without deciding, that there could be a tort of harassment, and suggested this action would require: (i) outrageous conduct by the defendant; (ii) intention of causing or reckless disregard of causing emotional distress; (iii) the plaintiff's suffering of severe or extreme emotional distress (i.e., emotional distress of such substantial quantity or enduring quality that no reasonable person in a civilized society should be expected to endure it); and (iv) causation, meaning the defendant's conduct was the actual and approximate cause of the emotional distress suffered by the plaintiff.

While the above framing does suggest a slightly lower standard than the *Wilkinson* tort (just discussed), insofar as "distress" here does not seem to require actual physical or psychiatric harm, it nevertheless contemplates that such distress be severe or extreme. That, coupled with the requirement that the conduct be "outrageous", suggests the tort would likely not be available in any but the most serious cases of invasion of privacy. Furthermore, it seems sensible that any such harassment tort ought to require a series of acts before harassment is made out (although that is not mentioned in *Mainland Sawmills*), for harassment itself is typically conceptualized as involving more than a single incident.[84] Indeed, in England, which has a statutory harassment tort, the claimant must show the defendant engaged in a "course of conduct".[85] If this requirement were adopted in Canada, it would likely mean a single invasion of privacy—however extreme—would not be actionable, thus limiting the tort's utility for vindicating some invasions of privacy.

(C) Invasions of Privacy by Disclosing Private Information

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[81] Ontario courts have rejected the existence of this tort in *Guillaume v Toronto (City)*, 2010 ONSC 5045, 193 ACWS (3d) 44 and *Lynch v Westario Power Inc*, [2009] OJ No 2927 at para 66 (Ont SC). In British Columbia there is mixed authority: *Canadian Tire Bank v Roach*, 2006 BCPC 120 and *Toban v Total Credit Recovery (BC) Ltd*, 2001 BCPC 465, 152 ACWS (3d) 633 were decided on the assumption this tort exists, but in *510267 BC Ltd v Gilmore*, 2005 BCSC 756, 140 ACWS (3d) 120 and *Campbell v Wellfund Audio-Visual Ltd* (1995), 14 CCEL (2d) 240, 58 ACWS (3d) 64 (BCSC) the courts rejected the existence of any discrete harassment tort.

[82] Indeed, in England, where a statutory harassment tort was recently created (The *Protection from Harassment Act 1997* (UK), c 40), courts have enjoined defendants from surreptitiously videotaping a person without her knowledge: *Howlett v Holding*, [2006] EWHC 41 (QB). For a discussion of cases applying this act to vindicate various invasions of privacy—including the publication of private information—see Mark Thomson & Nicola McCann, "Harassment and the Media" (2009) 1 J Media L 149.

[83] *Mainland Sawmills Ltd v IWA-Canada, Local 1-3567 Society*, 2006 BCSC 1195, 152 ACWS (3d) 543 [*Mainland Sawmills*].

[84] Harassment is defined as involving conduct or actions that are usually "repeated" or "persistent": *Black's Law Dictionary*, 10th ed, *sub verbo* "harassment".

[85] *Protection from Harassment Act 1997, supra* note 82, s 1.

i. Malicious Falsehood

Kaye v Robertson exemplifies the lengths to which common law courts have been willing to press existing torts into service to remedy serious invasions of privacy.[86] In that case, the celebrity claimant was injured in a car accident. The defendant, a tabloid journalist, photographed Kaye in his hospital room. He intended to publish these photographs in an article about Kaye's injury and recovery, which was written as a bedside "interview". Kaye, being semi-conscious, was incapable of consenting to this.[87] Bingham LJ characterized this intrusion as a "monstrous invasion of…privacy".[88] Because no tort of invasion of privacy existed in England at that time—something each Judge lamented[89]—Kaye sought to press his claim into a variety of other actions. After rejecting several actions as inapplicable, the court held that malicious falsehood could apply.[90] The elements are: (i) the defendant has published words about the claimant, which are false; (ii) he did so maliciously; and (iii) the claimant suffered special damage as a result.[91] However, special damage need not be proved if the defendant's words were calculated to cause pecuniary loss.[92] The impugned article was held to imply that Kaye consented to the "interview", which, in light of his incapacity, could not have been true. Regarding the second element, the court held that since the tabloid must have known Kaye was incapable of consenting to the "interview", implying otherwise in the article would "inevitably be malicious."[93] Regarding the third element, the court reasoned that Kaye's story was of economic value to him, as he could sell it to the highest tabloid bidder; and the defendant's unauthorized publication would "seriously lessen[]" this value, since the first telling is the most desirable.[94] The action was proved and an injunction issued.

Despite the claimant Kaye's success, the limits of malicious falsehood as a privacy remedy are obvious. By requiring the publication to be false, the action fails to capture the essence of most privacy claims—i.e, that *true* private information has been disclosed. Indeed, as it turned out, the defendant was able to circumvent the

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[86] See *supra* note 72 at 70 (Bingham LJ emphasized this point).

[87] *Ibid* at 64.

[88] *Ibid* at 70; *cf* Leggatt LJ at 71 and Glidewell LJ at 66 (both Lords acknowledged invasion of privacy was the essence of the complaint).

[89] See, especially, the comments *ibid* of Bingham LJ at 70, and also those of Leggatt LJ at 71 and Glidewell LJ at 66.

[90] An interlocutory injunction was issued preventing publication of anything suggesting Kaye had consented to the article or photographs.

[91] *Supra* note 72 at 67.

[92] *Ibid* at 67; *Clerk and Lindsell*, *supra* note 36 at 1486.

[93] *Supra* note 72 at 68.

[94] *Ibid.*

injunction issued in *Kaye* by augmenting the story to note the plaintiff had *not* in fact consented to the interview or to the taking of the photographs.[95] Additionally, the third element, which reflects the economic rather than dignitary basis of malicious falsehood,[96] means invasions of privacy are not actionable unless some economic harm has been intended or suffered—again, this puts the tort beyond the reach of many ordinary (as opposed to celebrity) claimants, who will simply not be able to satisfy this requirement.

ii. Defamation

Defamation actions are aimed at vindicating the claimant's reputation. There is widespread agreement among courts that, like privacy, reputation is a dignitary interest.[97] Courts have occasionally noted this conceptual symmetry between privacy and reputation—indeed, the Supreme Court of Canada has remarked that these rights are "intimately related".[98] Many academic commentators have offered similar views.[99]

Tolley v Fry is an old English case in which the House of Lords was able to remedy an invasion of privacy indirectly by using the tort of defamation.[100] The claimant, Tolley, was an amateur golfer of some repute, who was upset that the defendant, Fry, a chocolatier, had used his image in an advertisement without permission. The House determined that the defamation claim was made out because, by using his image, Fry had falsely implied that Tolley had endorsed the defendant's product, which further implied that Tolley had accepted some payment for doing so. These implications, the Court held, were defamatory because they could tarnish Tolley's status as an amateur golfer.[101] Interestingly, in *Kaye* (discussed immediately

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[95] Basil S Markesinis, "Our Patchy Law of Privacy—Time to Do Something About It" (1990) 53:6 Mod L Rev 802. Bingham LJ, writing extra-judicially after the *Kaye* case, noted the newspaper lawfully published the "interview", "boasting of the fact that it had been obtained without Mr. Kaye's consent": Thomas Bingham, "Should There Be A Law to Protect Rights of Personal Privacy?" (1996) 5 Eur HRL Rev 450 at 457.

[96] See *Clerk and Lindsell*, *supra* note 36 at 1479-80 .

[97] *Reynolds v Times Newspapers Ltd* (1999), [2001] 2 AC 127 at 201, [1999] 4 All ER 609 (HL) ("Reputation is an integral…part of [a person's] dignity"); *Hill v Church of Scientology of Toronto*, [1995] 2 SCR 1130 at paras 120-23, 126 DLR (4th) 129 [*Hill*] ("[R]eputation…serves the…fundamentally important purpose of fostering our self-image and sense of self worth…. [R]eputation…represents and reflects the innate dignity of the individual"); *cf Rosenblatt v Baer*, 383 US 75 at 92, 86 S Ct 669 (1966).

[98] *Hill*, *ibid* at para 121; *cf Roberson v Rochester Folding Box Co*, 64 AD 30 at 33-34, 71 NYS 876 (1901) in which the court observed that it saw "no distinction in principle" between injuring one's reputation and invading one's privacy; *cf supra* note 8 at paras 53-80.

[99] See, for elaboration, Dario Milo, *Defamation and Freedom of Speech* (Oxford: Oxford University Press, 2008) at 22-3; Robert C Post, "The Social Foundations of Privacy: Community and Self in the Common Law Tort" (1989) 77:5 Cal L Rev 957 at 964; Michael Tugendhat & Iain Christie, eds, *The Law of Privacy and the Media* (Oxford: Oxford University Press, 2002) at 92; William Prosser, "Privacy" (1960) 48 Cal L Rev 383 at 389.

[100] *Tolley v JS Fry & Sons*, [1931] AC 333 (HL(Eng)) [*Tolley*].

[101] See "Report of the Committee on Privacy", *supra* note 28 at 288 (*Tolley*, *ibid* is the "nearest the law of defamation ever came to protecting 'privacy' as such"); *cf* Percy Winfield, "Privacy" (1931) 47 Law Q Rev 23 at 33-35 (Arguing in an article written before the House rendered its decision in *Tolley* that the case was

above), two member of the English Court of Appeal showed some willingness to apply *Tolley* on the facts before it, despite acknowledging the essence of Kaye's complaint was invasion of privacy, not reputational harm.[102] In *Monson v Tussauds*,[103] an earlier English case that commentators have said is really about privacy, not reputation,[104] the claimant, who had been acquitted of murder, obtained an order compelling a wax museum to remove an effigy of himself on the basis of defamation.[105]

Canadian cases of more recent vintage have also invoked defamation to vindicate invasions of privacy. One example, which parallels *Monson*, concerned a high school principal's successful defamation suit again the Nanaimo Teacher's Association. The defendant had circulated newsletters depicting the plaintiff in a caricatured manner, making a vulgar gesture and holding out his hand for money. The trial judge found the image to be defamatory, and observed that a "newspaper is not entitled to invade private life in order to discuss questions of character with which the public is not concerned".[106] More recently, in *Trout Point Lodge Ltd v Handshoe*,[107] the Nova Scotia Supreme Court awarded general, aggravated, and punitive damages to the plaintiff, who was defamed by the defendant's acts of posting multiple homophobic statements as well as doctored sexual images of him online. Relying on the Ontario Court of Appeal's contemporaneous decision in *Jones*,[108] the plaintiff had also argued invasion of privacy as an independent claim. Justice Hood appeared receptive to the plaintiff's argument, but ultimately declined to adjudicate the privacy claim on the merits (though she did suggest that a Nova Scotia court can recognize a common law privacy tort in the future).[109] Importantly, her Ladyship observed that the invasion of privacy the plaintiff suffered in this case could be remedied by the

really concerned with a "discreditable intrusion on individual privacy" and urging the House to recognize an independent privacy tort rather than rely on defamation).

[102] *Supra* note 72, Glidewell LJ at 67 and Bingham LJ at 70 found it arguable the publication was libellous.

[103] *Monson v Tussauds Ltd*, [1894] 1 QB 671 (CA) [*Monson*].

[104] See Anonymous, "Is This Libel? More About Privacy" (1894) 7 Harv L Rev 492. The aspect of privacy covered by defamation here is more naturally covered under the tort of misappropriation of personality, which is discussed in further detail below.

[105] Interestingly, two of the judges also denounced the practice of newspaper journalists and museum exhibitors detailing even truthful incidents of peoples' private lives: *supra* note 103 at 678 (Matthew J), 697 (Lord Halsbury), discussed in David J Seipp, "English Judicial Recognition of a Right to Privacy" (1983) 3:3 Oxford J Leg Stud 325 at 344.

[106] *Mitchell v Nanaimo District Teachers' Assn*, [1993] BCWLD 785, 1993 CanLII 1751 (SC).

[107] *Supra* note 8.

[108] *Supra* note 5.

[109] See *supra* note 8 at para 55.

accompanying defamation action, which motivated her to simply proceed down that well-worn jurisprudential path.[110]

Despite these creative judicial efforts, defamation suffers from serious limitations as a privacy remedy. The requirement that information be false means true statements are not actionable. Additionally, because defamation is concerned with the claimant's *public* reputation,[111] actionability requires proof that the false publication would "tend to lower [the claimant] in the estimation of right-thinking members of society generally".[112] We can imagine many privacy invasions that would not satisfy this requirement, such as where the information is of a salutary—but nevertheless intimate—nature.[113]

iii. Breach of Confidence

Breach of confidence is an ancient equitable cause of action. In *Coco v AN Clark (Engineers) Ltd*, which is often taken as the seminal restatement of the action in its modern form,[114] Megarry J traced its origins back to a 16th century couplet of Sir Thomas Moore who, in a passage that emphasizes the conscience based, relationship-centric focus of the doctrine, said "confidence is the cousin of trust".[115] In *Attorney General v Observer Ltd*, the House of Lords endorsed the following formulation as set out by Megarry J in *Coco*:

> First, the information itself…must 'have the necessary quality of confidence about it.' Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it.[116]

The Supreme Court of Canada has also accepted the above formulation.[117]

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[110] *Ibid* at para 80. Note that Justice Hood at para 79 emphasized as well that reputation and privacy are intimately related.

[111] *Supra* note 45 at 458; see also Raymond Wacks, *Protection of Privacy* (London: Sweet & Maxwell, 1980) at 17 ("The plaintiff ought not be barred from recovery when the disclosure does not affect the esteem in which he is held").

[112] *Sim v Stretch*, [1936] 2 All ER 1237, quoted in *supra* note 45 at 458; *cf* Winfield, *supra* note 101 at 40 (defamation's concern for the claimant's public reputation makes it insufficient as a privacy remedy); *cf* Samuel Warren & Louis Brandeis, "The Right to Privacy" (1890) 4 Harv L Rev 193 at 197-8 (Defamation injures the individual in his external relations—how others view him; privacy concerns a man's "estimate of himself").

[113] Such as zoom-lens targeting of a celebrity parent playing with their child in a park.

[114] That is, before the action was reworked again by the House of Lords in *supra* note 2, which I discuss further below.

[115] *Coco v AN Clark (Engineers) Ltd*, [1968] FSR 415 (Ch) at 419 [*Coco*].

[116] *Attorney General v Observer Ltd*, [1990] 1 AC 109 at 268 (HL).

[117] *LAC Minerals Ltd v International Corona Resources Ltd*, [1989] 2 SCR 574, 61 DLR (4th) 14.

Breach of confidence, in this classical form, has long provided a measure of protection for the unwanted disclosure of private information. In *Argyll v Argyll*, for example, Ungoed-Thomas J enjoined the defendant from disclosing information relating to his former wife's "private life, personal affairs or private conduct" communicated in the course of marriage.[118] Similar results have been obtained in other cases involving secrets shared in non-marital relationships, on the basis that when information is entrusted to a person for a limited purpose, it will be unconscionable and hence inequitable for the recipient to subsequently disclose it.[119] It has also long been the case that an obligation of equitable confidence can extend to third parties if they receive information from an individual who is herself under an equitable duty of confidence. This can be seen in *Prince Albert v Strange*, a case in which Prince Albert entrusted private etchings of himself and Queen Victoria to a printer, who then gave these to a third party who sought to publish them without permission. Lord Cottenham issued an injunction on the basis that the third party was impressed with an obligation of confidence because the etchings were initially shared in confidence between the Prince and his printer.[120]

Breach of confidence (in its classical form, which remains the law in Canada) suffers from two serious limitations as a privacy remedy. The first is that the doctrine depends on there being a confidential relationship *in fact* in which information is voluntarily communicated.[121] This is because, as Browne-Wilkinson VC said in one leading case, "[i]t is the acceptance of the information on the basis that it will be kept secret that affects the conscience of the recipient of the information",[122] and this, in turn, affords equity the jurisdiction to intervene.[123] This requirement of an antecedent relationship of confidence considerably limits the circumstances in which this

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[118] *Argyll v Argyll*, [1967] Ch. 302 at 317, [1965] 1 All ER 611.

[119] See e.g. *Stephens v Avery*, [1988] Ch 449, [1988] 2 All ER 477 456 [*Stephens*]; *Barrymore (Michael) v NGN Ltd*, [1997] FSR 600 (Ch).

[120] *Prince Albert v Strange*, (1849) 18 LJ Ch 120, 41 ER 1171; see *supra* note 2 at para 45 for this interpretation of *Prince Albert*.

[121] To be sure, several English cases have imposed obligations of confidence on complete strangers, who obtain information notwithstanding the absence of an antecedent relationship of confidence. These cases have been criticized in detail in Chris DL Hunt, "Rethinking Surreptitious Taking in the Law of Confidence" (2011) 1 Intellectual Property Q 66. Further discussion of this point would require considerable space, and falls largely outside the scope of this paper.

[122] *Stephens*, *supra* note 119 at 456; *cf* the Law Commission for England and Wales summarised its view by noting obligations of confidence arise where information is "entrusted" by one person to another (UK, Law Commission, *Breach of Confidence* (No 110) (London: The Stationary Office, 1981) at para 2.2) [*Breach of Confidence*]; *cf* Helen Fenwick and Gavin Phillipson, *Media Freedom Under the Human Rights Act* (Oxford: Oxford University Press, 2006) at 736 (obligation of confidence depends, classically, on an *agreement* to keep information confidential).

[123] *Mussen v Van Diemen's Land Co* (1937), [1938] Ch 253 at 261, [1938] 1 All ER 210 ("The basis, and the whole basis…of all equitable relief—is that that it is against conscience"); *Re Diplock's Estate*, [1948] Ch 465 at 488, [1948] 2 All ER 31 ("An equitable claim predicates that the conscience of the defendant must be affected").

equitable action can apply, for it would not—in its classical formulation, at least—extend to a complete stranger who is not himself in a relationship of confidence with the claimant, or who do not obtain information from someone else who was in such a relationship.[124] The second limitation inherent in breach of confidence is that the action is concerned, *essentially*, with the unauthorized *disclosure* of confidential information. Accordingly, it does not extend—at least historically—to capture bare intrusions into private places.[125]

These two limits no longer constrain breach of confidence in England. The first limit was removed by the House of Lords in *Campbell v MGN*, a case in which a supermodel claimant sued a tabloid for breach of confidence in relation to photographs it took and subsequently published which showed her emerging from a Narcotics Anonymous meeting. A majority of the House of Lords decided in Campbell's favour, even though no relationship of confidence existed between Campbell and the paparazzo who took the photograph. The court was able to reach this result by changing the test so that the second *Coco* element is no longer a prerequisite to recovery. Now, the action can extend to complete strangers solely on the basis that the information or activities that are accessed and subsequently disclosed are "private".[126] Regarding the second limit discussed above, it too appears to have been overcome through an "expansive interpretation" of when information has been "misused".[127] This occurred in *Tchenguiz v Imerman*, in which the Court of Appeal determined there had been an actionable breach of confidence where the defendant had accessed and copied the claimant's private records without permission, even though he had not subsequently disclosed them. [128] Accordingly, in England at least, breach of confidence may now capture some types of bare intrusions.[129]

While these two developments may be desirable from a privacy perspective (insofar as they expand the reach of equitable confidence, thereby capturing more privacy invasions), they do come at the expense of doctrinal coherence. Scholars have criticized the approach in *Campbell* on the basis that dropping the second *Coco*

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[124] These arguments have been elaborated on in Hunt, *supra* note 121.

[125] See *ibid* for a discussion. *Cf* Tanya Aplin et al, *Gurry on Breach of Confidence: The Protection of Confidential Information*, 2nd ed (Oxford: Oxford University Press, 2012) at 15.02, 15.18-15.23.

[126] *Supra* note 2 at paras 14, 20 (per Lord Nicholls), 46-51 (per Lord Hoffmann), 85 (per Lord Hope), 134 (per Baroness Hale), 165 (per Lord Carswell); *cf Douglas v Hello! Ltd (No 6)*, [2005] EWCA Civ 595 at para 83, [2005] 3 WLR 881 [*Douglas*]. For a modern restatement of the action, which requires the claimant to show that they have a reasonable expectation of privacy in relation to the information or activities in question, see *Murray v Express Newspapers Plc*, [2008] EWCA Civ 446, [2008] 3 WLR 1360.

[127] Moreham, *supra* note 18 at 360.

[128] See *Tchenguiz & Ors v Imerman*, [2010] EWCA Civ 908 at paras 68-69, [2011] 2 WLR 592.

[129] It is not clear whether this amplified (and some would say artificial) concept of "misuse" extends beyond cases where private *information* is accessed. There has been some suggestion that accessing a person by taking their photograph in a harassing manner could violate Article 8 of the European Convention on Human Rights which guides the development of the English breach of confidence action: *Wood v Commissioner of Police for the Metropolis*, [2009] EWCA Civ 414 at para 34, [2010] WLR 123.

requirement does violence to the equitable underpinnings of classical confidence.[130] This is because classical confidence, being an equitable doctrine, depends for its jurisdiction upon the conscience of the recipient of information being affected, which is not the case unless he has been entrusted with the information initially, or acquired the information from someone else in such a relationship.[131] Regarding the expansive interpretation of "misuse", it appears to stretch the ordinary meaning of that word to apply it to capture scenarios where no use at all has been made of the information, as would be the case in many instances of bare intrusions (such as a Peeping Tom, say). An additional conceptual objection can be levelled against the English approach: by shoehorning privacy claims into the equitable breach of confidence action, it has the potential to confuse the different policies underpinning each claim, and hence the principled development of each doctrine. Recognition of this led a majority of the New Zealand Court of Appeal to reject the approach endorsed in *Campbell* and to create a new privacy tort instead.[132] The majority observed:

> Privacy and confidence are different concepts. To press every case calling for a remedy for unwarranted exposure of information about the private lives of individuals into a cause of action having as its foundation trust and confidence will be to confuse those concepts.[133]

For these reasons, it would be preferable, in my view, for Canadian courts in those provinces without discrete privacy actions to eschew the English breach of confidence approach, and instead simply proclaim the existence of an independent privacy tort. This is, of course, what the Ontario Court of Appeal did recently in *Jones*. Interestingly, Justice Sharpe's justification for doing so parallels the House of Lords' rationale for modifying breach of confidence to better protect privacy in *Campbell*.[134]

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[130] See Ayre Schreiber, "Confidence Crisis, Privacy Phobia: Why Invasion of Privacy Should be Independently Recognised by English Law", (2006) Intellectual Property Q 160 at 170-76; Nicole Moreham, "*Douglas and Others v Hello! Ltd*—the Protection of Privacy in English Private Law" (2001) 64:5 Mod L Rev 767 at 770; Rachael Mulheron, "A Potential Framework for Privacy? A Reply to *Hello!*" (2006) 69:5 Mod L Rev 679 at 684-87; A Sims, "A Shift in the Centre of Gravity: The Dangers of Protecting Privacy through Breach of Confidence" (2005) Intellectual Property Q 27 at 33-34; Russell Brown, "Rethinking Privacy: Exclusivity, Private Relation and Tort Law" (2005) 43 Alta L Rev 589 at 611-12.

[131] See *Stephens*, *supra* note 119 at 456; *cf* the Law Commission for England and Wales summarized its view by noting obligations of confidence arise where information is "entrusted" by one person to another (*Breach of Confidence*, *supra* note 122 at para 2.2). *cf* Helen Fenwick & Gavin Phillipson, *Media Freedom Under the Human Rights Act* (Oxford: Oxford University Press, 2006) at 736 (obligation of confidence depends, classically, on an *agreement* to keep information confidential). For a detailed discussion about how the modification in *Campbell* is not consistent with classical confidence, see Hunt, *supra* note 121.

[132] *Hosking v Runting*, [2004] NZCA 34 at para 48, [2005] 1 NZLR 1.

[133] *Ibid.*

[134] *Supra* note 5. Justice Sharpe's justification for creating a privacy tort in *Jones* parallels the House of Lords' rationale for modifying breach of confidence to protect privacy in *Campbell*. In *Jones*, Sharpe J drew upon the doctrine of *Charter* values (and in particular, privacy rights under s 8 of the *Charter*) to incrementally develop the common law (at para 45). In *Campbell*, Lord Hoffmann invoked the principle of "horizontality", which holds that Courts should develop the common law consistently with the rights

iv. Appropriation of Personality

The four common law provinces with statutory privacy torts each expressly capture within their respective ambits what is often referred to, loosely, as the "appropriation of personality". These statutes are based on the American common law, as reflected in the *Restatement of the Law Second, Torts*, which also has a tort of misappropriation of personality.[135] In Manitoba, Saskatchewan, and Newfoundland and Labrador, appropriation refers to the unauthorized use of one's name or likeness or voice, and these are treated in the respective Acts as specific examples of the more general tort of invasion of privacy.[136] In British Columbia, appropriation is treated as a separate "special" tort,[137] not as an example of the general tort of invasion of privacy; and appropriation does not appear to cover the use of another's voice, but rather is limited to the unauthorized use of one's name or portrait, with the latter including a caricature.[138] Importantly, in all four of these provinces, appropriation also requires that the defendant's use of the plaintiff's "personality" be for the purposes of advertising or other commercial gain.[139]

Courts in Ontario have long recognized a common law equivalent to the above statutory torts. The seminal case is *Krouse v Chrysler Canada Ltd*.[140] Although the action failed on the facts in that case, the Ontario Court of Appeal recognized in principle that appropriation of personality could be actionable at common law in appropriate circumstances.[141] The opportunity to do so came several years later in

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conferred under the European Court of Human Rights (including the right to respect for private life under article 8): see *supra* note 2 at para 51.

[135] *Supra* note 6 at s 652 (A-D).

[136] *The Privacy Act*, CCSM c P125, s 3(c) [*Privacy* MB]; *The Privacy Act*, RSS 1978, c P-24, s 3(c) [*Privacy* SK]; *Privacy Act*, RSNL 1990, c P-22, s 4(c) [*Privacy* NL].

[137] David Vaver, "What's Mine is Not Yours: Commercial Appropriation of Personality Under the Privacy Acts of British Columbia, Manitoba and Saskatchewan" (1981) 15 UBC L Rev 241 at 254.

[138] *Privacy Act*, RSBC 1996, c 373, s 3 [*Privacy* BC].

[139] *Privacy* MB, *supra* note 136 s 3(c); *Privacy* SK, *supra* note 136 s 3(c); *Privacy* NL, s 4(c); *Privacy* BC, *ibid*, s 4(2). For a further discussion of these statutes, see: Amy M Conroy, "Protecting Your Personality Rights In Canada: A Matter of Property or Privacy?", online: (2012) 1:1 U Western Ontario J Leg Studies 3 <ir.lib.uwo.ca/uwojls/vol1/iss1/3>. The requirement of commercial gain derives from the fact that these torts reflect a mixture of both privacy rights and property rights—indeed, this probably explains why in the British Columbia legislation appropriation is treated separately from the more general tort of invasion of privacy, with the implication that an action may be made out even where there is nothing "private" about the information at all. Scholars have long noted that appropriation involves this mixture of property concepts with notions of privacy, and several have argued that these torts should be understood in purely economic terms, as they really have little to do with privacy *per se*: see e.g: Robert C Post, "Rereading Warren and Brandeis: Privacy, Property, and Appropriation" (1991) 41 Case W Res L Rev 647; Des Butler, "A Tort of Invasion of Privacy for Australia?" (2005) 29:2 Melbourne UL Rev 339 at 368.

[140] *Krouse v. Chrysler Canada Ltd* (1973), 13 CPR (2d) 28, 1 OR (2d) 225 (CA).

[141] *Ibid* at para 37.

Athans Jr v Canadian Adventure Camps Co,[142] which involved the unauthorized use by the corporate defendant of the plaintiff's image and persona as a water skier to promote the former's summer camp. The trial judge held that by using the plaintiff's image to advertise their camp, the defendant had infringed the former's right to market his personality—and this was tortious, independent of any claim in copyright law.[143] Moreover, as with the statutory torts above, it appears that actionability depends on some mixture of economic benefit to the defendant, or at least some use by him of the plaintiff's likeness for advertising purposes.[144] It may well be that other provinces without discrete statutory torts may follow Ontario's lead in this respect, although, to date, the issue has not been litigated in these jurisdictions.[145]

The potential reach of these appropriation torts is inherently limited by the twin requirements that (i) only the plaintiff's *likeness* (and, in British Columbia, voice) is protected, and (ii) that the defendant must use this likeness for the purposes of advertising or other commercial gain. Accordingly, these actions would not apply to invasions of informational privacy, such as email hacking and distribution; nor would they apply to the taking of unauthorized photographs, if these were not then used for commercial benefit.

v. A Note on Private Sector Data Protection Legislation

A detailed discussion of data protection legislation falls outside the present scope of this paper, as my primary purpose is to examine the various common law actions that have been used to protect individual privacy. Nevertheless, it is worthwhile making a few brief points, for completeness.

The *Personal Information Protection and Electronic Documents Act*[146] (PIPEDA) is a federal statute applicable to private sector organizations in Canada that collect, use, or disclosure "personal information" in the course of their "commercial activities". Personal information is defined as "information about an identifiable individual".[147] PIPEDA imposes 10 obligations (referred to as "fair information

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[142] *Athans Jr v Canadian Adventure Camps Co*, [1977] 2 ACWS 1065, 17 OR (2d) 425 (SC, H Ct J).

[143] *Ibid* at para 28.

[144] See Conroy, *supra* note 139 at 13, discussing two cases in Ontario that reflect this view: *Horton v Tim Donut*, [1997] OJ No 390, 68 ACWS (3d) 1030 (Ont Ct J (Gen Div)), and *Gould Estate v Stoddart Publishing Co*, [1996] OJ No 3288, 65 ACWS (3d) 998 (Ont Ct J (Gen Div)).

[145] See Conroy, *supra* note 139 at 10.

[146] SC 2000, c 5.

[147] *Ibid*, s 2(1).

principles"[148]) on organizations with regard to the handling of personal information.[149] Three of these principles are core: the first is the idea of individual consent; the second and third concern organizational transparency and accountability in the collection, use, and disclosure of personal information.[150] PIPEDA also imposes an overarching, additional limitation: for the collection, use, or disclosure of personal information to be legitimate, it must be done "*only* for purposes that a reasonable person would consider…appropriate in the circumstances".[151] The objective reasonableness requirement serves to buttress the consent paradigm. Broadly speaking, the PIPEDA regime can thus be characterized as conditioning fair information practices upon a combination of individual *consent* and objective *reasonableness* in the collection, use, and disclosure of personal information.[152]

Three provinces (Alberta,[153] British Columbia,[154] and Quebec[155]) have enacted private sector data protection legislation that the federal cabinet has deemed "substantially similar" to PIPEDA.[156] This designation means private sector organizations in these three provinces are exempt from the operation of PIPEDA.[157] PIPEDA remains applicable to private sector organizations in the rest of Canada, however. The Alberta and British Columbia Acts (referred to as PIPAs) are very similar.[158] Like PIPEDA, their purpose is to govern the collection, use, and disclosure of personal information, which is defined similarly as in PIPEDA.[159] Like PIPEDA, the PIPAs place substantive restrictions on the collection, use, and disclosure of personal information by adopting substantively similar "fair information principles", and they also subject such dealing in personal information to an overarching reasonableness requirement.[160]

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[148] See Colin HH McNairn, *A Guide to the Personal Information Protection and Electronic Documents Act* (Markham, ON: LexisNexis, 2010) at 3.

[149] *Supra* note 146 Schedule I. These principles are: Accountability; Identifying Purpose; Consent; Limiting Collection; Limiting Use, Disclosure, and Retention; Accuracy; Safeguards; Openness; Individual Access; Challenging Compliance.

[150] See Lisa M Austin, "Is Consent the Foundation of Fair Information Practices? Canada's Experience Under PIPEDA" (2005) 56:2 UTLJ 181.

[151] *Supra* note 146, s 5(3) [emphasis added].

[152] *Supra* note 150 at 207-10.

[153] *Personal Information Protection Act*, SA 2003, c P-6.5.

[154] *Personal Information Protection Act*, SBC 2003, c 63.

[155] *An Act Respecting the Protection of Personal Information in the Private Sector*, RSQ c P-39.1.

[156] *Supra* note 148 at 9.

[157] *Ibid*. For individual provincial regulations, see: Quebec: SOR/2003-374; Alberta: SOR/2004-219; British Columbia: SOR/2004-220. See also *supra* note 146, s 26(2)(b).

[158] The Quebec legislation will not be discussed in this paper.

[159] *Supra* note 153, ss 1, 3; *supra* note 154, ss 1, 2.

[160] *Supra* note 153, ss 11, 14, 15; *supra* note 154, ss 4, 12, 13.

These legislative regimes have the obvious potential to play an important role in protecting personal privacy—indeed, doing so is their very *raison d'être*.[161] That said, they also suffer from a few significant limitations. The first, and perhaps most important, limitation is contained in PIPEDA, and thus applies to every common law province in Canada other than Alberta and British Columbia, namely: PIPEDA does not apply unless the organization is dealing with personal information in the "course of commercial activities".[162] Moreover, all three legislative regimes contain a series of exemptions that permit collecting, storing, and disclosing information for various, broadly defined purposes, including personal or domestic use, and artistic, literary, or journalistic reasons.[163] Adjudicators treat these categorical exemptions as jurisdictional in nature, so that if they apply in fact, there is no jurisdiction to impose any restrictions on an organization's dealing with personal information.[164] These limits mean that Canada's private sector data protection regimes will not capture a wide variety of privacy-invading conduct committed by a wide variety of differently motivated individuals.

4. Problems with this Hodgepodge Protection of Privacy

These efforts by judges to press existing causes of action into service to protect privacy have resulted in a patchwork of protection that is not inconsiderable. Nevertheless, this hodgepodge approach suffers from three inherent shortcomings: (i) there are gaps in the protection of privacy that this farrago affords; and using a hodgepodge of torts to protect privacy indirectly, rather than directly via a discrete privacy tort, (ii) causes conceptual and jurisdictional fragmentation, and (iii) results inevitably in unprincipled decisions making. In this section, I briefly elaborate on these three points.

(A) Gaps in Protection

The above discussion illustrates that, owing to the internal limitations of each nominate cause of action discussed, various gaps exist resulting in privacy being under-protected in those common law provinces that lack discrete statutory privacy torts or equivalent common law actions.[165] Consider, for example, if a case similar to *Kaye* were to arise in one of these jurisdictions, but with the facts slightly altered so that the defendant magazine did not publish the contrived "interview" of the semi-conscious patient. In *Kaye*, Lord Justices Leggatt and Bingham both condemned the

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[161] See *supra* note 146, s 3.

[162] *Ibid*, s 4(1)(a). Note that this requirement is obviated where the information is about an employee working in a federal undertaking: s 4(1)(b).

[163] *Ibid*, ss 4(2)(b)-(c); *supra* note 153, ss 4(3)(a)-(c); *supra* note 154, ss 3(2)(a)-(b).

[164] For a discussion, see: Teresa Scassa, "Journalistic Purposes and Private Sector Data Protection Legislation: Blogs, Tweets, and Information Maps" (2010) 35 Queen's LJ 733 at 755.

[165] Specifically, Alberta, New Brunswick, Nova Scotia, Prince Edward Island, the Yukon and the Northwest Territories.

bare intrusion into privacy in the strongest possible terms,[166] yet, in many Canadian provinces, the victim would be left without a remedy. Breach of confidence would not apply absent actual or threatened disclosure of the private information.[167] Defamation and malicious falsehood similarly require disclosures. The various data protection regimes would not capture the defendant if he was acting for a journalistic purpose, or if he was acting for a purely personal purpose of morbid voyeurism. Trespass to the person is not available, as there was no touching, and trespass to property would not apply unless the hospital, as legal occupier, consented to be joined as a plaintiff.[168] Private nuisance suffers from the same limitation, and public nuisance will not capture invasions of privacy targeted at a single person. Appropriation of personality requires some commercial gain to the defendant, which would not be the case if the claimant was not a celebrity (with a marketable image) or, in any event, if the defendant did not publish the "interview". The *Wilkinson* tort may be the only avenue for redress, yet it would not apply if the claimant's injury failed to reach the level of physical harm or constitute a recognized psychiatric illness, which will, of course, often not be the case—especially where the plaintiff, as in *Kaye*, was only semi-conscious at the time of the intrusion and perhaps incapable of appreciating its gravity.

In short, a claimant in such circumstances as imagined above would find themselves without an adequate remedy in several Canadian jurisdictions, despite suffering what the English Court of Appeal described as a "monstrous" invasion of privacy.[169]

(B) Conceptual and Jurisdictional Fragmentation

The second problem with this hodgepodge approach is the fragmentation of analysis required to canvass the multiplicity of actions surveyed above. It is not conducive to clear analysis to require plaintiffs to press their privacy claims into this farrago. Professor Markesinis, speaking in the context of the English common law before the House of Lords' decision in *Campbell*, lamented that this fragmented approach was "patchy, capricious", and "uncertain".[170] It is indirect and conceptually confusing, and must inevitably impede the development of a coherent and principled law of privacy as a result.[171]

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[166] *Supra* note 72 at 71 (Leggatt LJ), 70 (Bingham LJ).

[167] See Mulheron, *supra* note 130 at 686-87; Christie, Moreham & Warby, *supra* note 43 at 431.

[168] As noted by Sims, *supra* note 130 at n 19.

[169] As acknowledged by Bingham LJ in *supra* note 72 at 70 ("The defendants' conduct…here was 'a monstrous invasion of…privacy'…If ever a person has a right to be let alone…it must surely be when he lies in hospital recovering from brain surgery and in no more than partial command of his faculties.").

[170] Markesinis, *supra* note 95 at 805.

[171] *Supra* note 75 at 24 (Noting there is "little chance of a coherent body of rules being developed" out a fragmented, hodgepodge approach to protecting privacy). See similarly: Eric Descheemaeker, "'Veritas non est Defamatio'? Truth as a Defence in the Law of Defamation" (2011) 31:1 LS 1 at 19.

In England, this conceptual fragmentation is exacerbated by jurisdictional fragmentation. Recall that in *Campbell* the House of Lords modified the equitable breach of confidence action (by dropping the requirement of an antecedent relationship of confidence) in order to provide a remedy to a supermodel whose image was captured and published by a paparazzo whom she had never met. Although several subsequent cases have referred to the reworked action as the "tort [of] misuse of private information",[172] it is clear from the majority in *Campbell* that, despite its stark departure from orthodoxy, this action remains anchored in breach of confidence.[173] This was made plain by the English Court of Appeal in *Douglas v Hello! (No. 3)*,[174] the first case to consider the reworked action after *Campbell*. The problem here is that, in England, post *Campbell*, equity formally protects against disclosures, whereas a combination of nominate common law torts protect against bare intrusions into privacy not followed by subsequent disclosures. So long as confidence is used to protect against disclosures, this fragmentation will persist since the reworked confidence action cannot in principle extend to bare intrusions.[175] Accordingly, breach of confidence cannot form the basis of a comprehensive law of privacy.[176] In my view, it cannot be right, as a matter of principle, to split these two types of privacy invasion—disclosures and intrusions—between equity on the one hand and common law tort on the other. The underlying complaint in both cases is that the person's right to privacy is violated. One action should cover both situations.

This jurisdictional fragmentation is avoided in those Canadian provinces with discrete statutory torts covering both intrusions and disclosures. As mentioned, in Ontario the common law privacy tort thus far only captures intrusions; it is hoped that courts will extend it to capture unauthorized disclosures of private information as well.[177] The remaining provinces in Canada should eschew the English breach of confidence approach, and instead recognize (through legislation or through the courts) discrete common law privacy torts covering both intrusions and disclosures.

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[172] See e.g. *McKennitt & Ors v Ash & Anor*, [2005] EWHC 3003, at para 8, [2006] EMLR 10 (QB); *supra* note 128 at para 65.

[173] *Supra* note 2: Lord Hope, at paras 85-87; Baroness Hale, at para 134; Lord Carswell, at para 162-3; *cf* Nicole Moreham, "Privacy in the Common Law: A Doctrinal and Theoretical Analysis" (2005) 121 Law Rev 628 (making this point).

[174] *Douglas*, *supra* note 126 at paras 9, 96. But see *contra supra* note 128 at para 65 ("[T]here is now a tort of misuse of private information").

[175] This view has been expressed by a number of commentators: Basil Markesinis et al, "Concerns and Ideas About the Developing English Law of Privacy (And How Knowledge of Foreign Law Might Be of Help)" (2004) 52:1 Am J Comp L 133 at 182; Butler, *supra* note 139 at 352; *supra* note 45 at 457. But note that, as mentioned above, in *supra* note 128, the English Court of Appeal recently held that simply accessing another's private documents, even without disclosure, may constitute a breach of confidence.

[176] *Supra* note 45 at 457; *cf* Hilary Delany, "Breach of Confidence or Breach of Privacy: The Way Forward" (2005) 27 Dublin U L J 151 at 166-68.

[177] For an elaboration of this point, examining the limits of the Ontario approach, see *supra* note 1.

(C) Unprincipled Decision Making

The final problem with the hodgepodge approach is that it is unprincipled. None of the nominate torts surveyed above have the protection of privacy as their core value. Each responds to a variety of different policies, such as the protection of reputation (defamation), compensation for psychiatric harm (intentional infliction of emotional distress), or the affirmation of the right to exclude others from property (trespass). It is, of course, owing to these different underlying policies that these various actions have developed their respective requirements and limitations. These requirements, which are sensible when measured against the *raison d'être* of each action, become less so when they are pressed into service to protect privacy. A better approach, surely, is to develop an independent tort that has the protection of privacy as its core value. Such an approach—protecting privacy directly, rather than obliquely—would surely be conducive to clearer analysis, result in fuller protection, and generally facilitate a coherent, and principled, law of privacy to develop.[178]

5. Conclusion

Until recently, Commonwealth courts had been notoriously reluctant to recognize the invasion of privacy as an independent actionable wrong. Nevertheless, from the above survey we see that many courts have been willing to fashion relief for invasions of privacy by pressing other nominate causes of action into service. While this hodgepodge approach does in totality yield a considerable measure of privacy protection, I have argued that it suffers from three related deficiencies. First, there are gaps in protection, especially concerning bare intrusions. Second, the analysis is fragmented both conceptually, by virtue of the hodgepodge itself, and jurisdictionally, at least in England, where equity protects against disclosures, whereas a variety of torts protect against bare intrusions. This fragmentation leads to the third shortcoming: pressing various torts into service to protect privacy necessarily thwarts principled decision-making, as none of these other actions have the protection of privacy, and its complex array of underlying values, as their core function.

In my view, provincial legislatures should act to create statutory privacy torts covering both intrusions and disclosures in those Canadian jurisdictions that have not yet done so. If they do not, judges should follow Justice Sharpe's lead in *Jones* and develop a discrete common law privacy tort.

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[178] Edward Bloustein, "Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser" (1964) 39 NYUL Rev 962 at 1004-05 (emphasising the need to identify a core value underpinning privacy tort cases in America so as to guide the development of the law in a conceptually unified and principled manner); *cf* Descheemaeker, *supra* note 171 at 19 (pressing various causes of action into service encourages fragmentary analysis, making it "virtually impossible to treat like cases alike", and will have the "unavoidable effect of adding to…the injustice of not granting principled protection to this [privacy] interest").